A GUIDE TO NETHERLANDS TAXATION FOR BUSINESSES

BE UNSTOPPABLE

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LEGAL | TAX | NOTARY

1. Tax Treaties and Residence

1.1 How many income tax treaties are currently in force in your jurisdiction?

There are 94 income tax treaties in force in the Netherlands. In addition, the Netherlands has signed several income tax treaties which are expected to enter into force in the future. Furthermore, the Netherlands is currently negotiating new income tax treaties and renegotiating a number of income tax treaties with existing tax treaty partners.

1.2 Do they generally follow the OECD Model Convention or another model?

Dutch income tax treaties generally follow the OECD Model Convention.

1.3 Do treaties have to be incorporated into domestic law before they take effect?

Before entering into force, tax treaties have to be approved by both chambers of the Dutch parliament. In addition, an announcement of the ratification should be made in the Dutch Treaty Series *(Tractatenblad van het Koninkrijk der Nederlanden)* before the treaty enters into force.

1.4 Do they generally incorporate anti-treaty shopping rules (or "limitation on benefits" articles)?

The current tax treaty policy of the Netherlands is the incorporation of a 'Principle Purpose Test' in its tax treaties.

1.5 Are treaties overridden by any rules of domestic law (whether existing when the treaty takes effect or introduced subsequently)?

The application of tax treaties overrides domestic Dutch law (irrespective of when the domestic law or tax treaty takes effect).

1.6 What is the test in domestic law for determining the residence of a company?

For Dutch corporate income tax purposes, a Dutch company (e.g. a limited liability company, B.V.) is deemed to be a tax resident of the Netherlands by virtue of the fact that it is incorporated under Dutch law. Dutch tax law does not therefore require Dutch companies to meet any tests for determining the residence of a company. Even though in principle any Dutch company is deemed to be a Dutch tax resident insofar it is incorporated under Dutch law, for some Dutch tax provisions and under (most) tax treaties the actual tax residency is decisive.

A company incorporated under non-Dutch law may be considered a Dutch tax resident if, based on an examination of all relevant facts and circumstances, it is determined that the company is a resident of the Netherlands. The place of effective management is one of the most important factors to decide on actual tax residency. The place of effective management is the place where key management and commercial decisions that are necessary for the conduct of the entity's business as a whole are in substance made (the company's 'mind and management'). The residency of the directors is considered an important factor by the Dutch tax authorities. Another important factor to decide on actual tax residency of the company is the place where board decisions are (formally and materially) taken. Also, for instance, the address where bank accounts of the company are kept, the country where the bookkeeping is done and the books are located, the office address, office space and the employment of personnel are all relevant.

2. Transaction Taxes

2.1 Are there any documentary taxes in your jurisdiction?

The Netherlands levies a real estate transfer tax on the transfer of Dutch real estate assets at a rate of 2% (for residential properties) and 6% (for other properties).

2.2 Do you have Value Added Tax (or a similar tax)? If so, at what rate or rates?

The Netherlands levies Value Added Tax (VAT) on the supply of goods and services as part of the domestic implementation of the EU VAT Directive (Directive 2006/112/EC). The current Dutch VAT system, therefore, is comparable to VAT systems of other EU Member States, though the Netherlands uses certain optional measures to facilitate trading. In the Netherlands, the following VAT rates apply to the supplies of goods and services: general rate: 21%; reduced rate: 9%; and zero rate: (0%).

2.3 Is VAT (or any similar tax) charged on all transactions or are there any relevant exclusions?
Certain transactions are treated as VAT exempt. Examples of such transactions are health care, education, financial services, insurance services, children day care, transfer or lease of certain real estate assets, funeral services and deposit and management of portfolio investments.

2.4 Is it always fully recoverable by all businesses? If not, what are the relevant restrictions?
A VAT entrepreneur may generally recover input VAT charged on goods provided and services rendered to him based on a proper invoice. There are certain exceptions, such as VAT charged on food and beverages and VAT charged in connection with exempt transactions.

2.5 Does your jurisdiction permit VAT grouping and, if so, is it "establishment only" VAT grouping, such as that applied by Sweden in the Skandia case?
A Dutch VAT group can be created by two or more persons established within an EU Member State, who, while legally independent, are closely bound to each other by (i) financial ties (i.e. more than 50% shareholding), (ii) organisational ties (i.e. central management), and (iii) economic ties (i.e. same or related activities or suppliers). In that case they can opt to be treated as one VAT entrepreneur. Transactions between the members of a VAT group are not subject to VAT. The right to deduct input VAT is based on the activities of the VAT group as a whole. The VAT group regime applies only if each member of the VAT group qualifies as an entrepreneur for VAT purposes.

According to the Dutch Ministry of Finance, the Dutch VAT group regime should not be considered "establishment only", such as that applied by Sweden in the *Skandia* case.

2.6 Are there any other transaction taxes payable by companies?
The Netherlands does not levy any other transaction taxes except for VAT and real estate transfer tax.

2.7 Are there any other indirect taxes of which we should be aware?
Besides VAT, the other main indirect taxes levied by the Netherlands are excise duties on certain categories of products (e.g. alcoholic beverages, tobacco and mineral oils), consumption taxes (e.g. on soft drinks, fruit juices and water) and import duties on various products imported from outside the EU.

3. Cross-border payments

3.1 Is any withholding tax imposed on dividends paid by a locally resident company to a non-resident?

The Netherlands levies generally 15% Dutch dividend withholding tax in respect of dividend distributions (and other payments treated as dividend for Dutch tax purposes) paid by Dutch tax-resident companies (or companies deemed to be tax residents).

An exemption applies to dividends distributed to corporate shareholders who own a share interest of at least 5% in the relevant Dutch tax-resident company if, in short, the corporate shareholder is a tax resident of the EU or a jurisdiction with which the Netherlands has concluded a tax treaty, is the beneficial owner of the dividend or if it is not a hybrid transaction and the subjective and objective tests are both met. The subjective test is met if – in short – a corporate structure was set up to avoid an individual's liability to pay dividend tax. The objective test is met if the corporate structure is deemed part of an artificial arrangement or transaction.

Application of the extensive tax treaty network or EU directives may result in a reduction or refund of Dutch dividend withholding tax.

3.2 Would there be any withholding tax on royalties paid by a local company to a non-resident?

Currently, the Netherlands does not levy withholding tax on interest and royalty payments. However, the Dutch government has announced that a withholding tax on interest and royalty payments will apply from 1 January 2021 onwards. The applicable rate will be 21.7%. The withholding tax would apply to intra-group interest and royalty payments by Dutch resident companies to related entities either residing in jurisdictions with no or low statutory tax rates (most likely less than 9%), in jurisdictions that are on the EU blacklist of non-cooperative jurisdictions or in abusive situations.

3.3 Would there be any withholding tax on interest paid by a local company to a non-resident?

Reference is made to our answer to question 3.2.

3.4 Would relief for interest so paid be restricted by reference to "thin capitalisation" rules?

As part of the implementation of the Anti-Tax Avoidance Directive 1, as of 1 January 2019, the Dutch earning stripping rules limit the deduction of excessive interest expenses related to intra-group and third-party payables for Dutch corporate income tax purposes.

3.5 If so, is there a "safe harbour" by reference to which tax relief is assured?

Under the Dutch earning stripping rules, the starting point is to determine the Dutch taxpayers' so-called interest expense excess, which is the amount by which the Dutch taxpayers' tax-deductible interest expenses exceed their taxable interest income. The deductibility of the interest expense excess is limited to 30% of the taxpayers' EBITDA (carving out tax exempt income) or a safe harbour threshold of EUR 1 million, whichever is higher. Interest disallowed under the earning stripping rules can be carried forward to later years without any time limitations.

3.6 Would any such rules extend to debt advanced by a third party but guaranteed by a parent company?

The Dutch earning stripping rules apply to interest payments to both intra-group companies and third parties.

3.7 Are there any other restrictions on tax relief for interest payments by a local company to a non-resident, for example pursuant to BEPS Action 4?

Besides the earning stripping rules, Dutch corporate income tax law includes several rules based on which the deduction of interest can be denied.

Under the Dutch anti-tax base erosion rules, the deduction of interest expenses (including currency results and other costs) is limited to related party loans that have been used to finance: profit distribution or repayment of capital to related parties; capital contributions to related parties; or the acquisition or increase of share interests in entities that are, or become, related parties. There are, however, exceptions under which the interest deduction limitation rule does not apply (e.g., if the loan and the transaction are based primarily on business reasons).

In addition, there is a rule limiting the deduction of interest and value fluctuations of low or no interest-bearing loans. Under these rules, interest expenses and fluctuations in the value of loans are not deductible if (i) a loan is a related party loan, (ii) it does not have a fixed repayment date of over 10 years after contracting the loan, and (iii) while legally or actually no interest has been charged or the interest is, to a considerable extent, lower than the economic value of what independent parties would have agreed upon.

Finally, Dutch tax law limits the deduction of interest and value fluctuations of loans if the loan would have the characteristics of equity for Dutch tax purposes. This can either be a sham loan, a profit-dependent loan or a participation loan (i.e. the payment of interest depends on whether the creditor is in a profit making position, the loan is subordinated to all other creditors and the loan has no maturity date or a maturity period of 50 years or more, and is therefore only collectable in case of bankruptcy).

3.8 Is there any withholding tax on property rental payments made to non-residents?

The Netherlands does not currently levy a withholding tax on property rental payments. However, non-Dutch tax-resident companies are subject to corporate income tax from certain Dutch sources, including rental payments derived from Dutch real estate.

3.9 Does your jurisdiction have transfer pricing rules?

For Dutch tax purposes, transactions between affiliated entities must be performed under the same terms and conditions as would be agreed between non-affiliated entities under similar circumstances (the so-called ‘arm’s length principle’). If the terms and conditions of an affiliated party transaction are not at arm’s length, the transaction is taxed as if they had been.

For Dutch transfer pricing purposes, companies are considered to be affiliated if one entity participates – directly or indirectly – in the management, control or capital of another entity, or if the same person participates – directly or indirectly – in the management, control or capital of two entities. All Dutch taxpayers must have documentation available showing that the terms and conditions applied to affiliated party transactions are at arm's length. In addition, multinationals with a consolidated group turnover of at least EUR 750 million in the preceding year are required to file country-by-country (CbC) reports containing detailed information on the transfer pricing policy and allocation of assets and personnel within the group. CbC reports are then exchanged automatically with the tax authorities of all countries in which the multinational group operates. Furthermore, Dutch taxpayers that are part of a multinational group with a consolidated turnover of at least EUR 50 million in the preceding year must prepare both so-called 'master files' and 'local files'. The master file provides an overview of the multinational's core business, the allocation of income and the global transfer pricing policy, while the local file is necessary for the transfer pricing analysis and includes information on intra-group transactions involving the Dutch taxpayer.

4. Tax on Business Operations: General

4.1 What is the headline rate of tax on corporate profits?

Dutch tax-resident companies are subject to Dutch CIT at a tax rate of 20% over the first EUR 200,000 of profit. The profits exceeding EUR 200,000 are taxed at 25%. Please note that there have been amendments to the envisaged changes of the Dutch CIT rate in the coming years. Now, it is envisaged that the standard CIT rates will be reduced in steps: 16.5% over profits up until EUR 200,000 in 2020 (the 25% rate remains unchanged); and 21.7% over profits exceeding EUR 200,000 in 2021 (the 16.5% rate remains unchanged).

4.2 Is the tax base accounting profit subject to adjustments, or something else?

The profit for accounting purposes may differ from the profit for Dutch tax purposes. The profit for Dutch tax purposes is based on the principle of 'sound business practice', which originates from Dutch case law. After the profit for Dutch tax purposes is determined, there may be certain other adjustments that determine the actual taxable amount based on the provisions of the Dutch corporate income tax Act.

4.3 If the tax base is accounting profit subject to adjustments, what are the main adjustments?

The main adjustments between the profit for Dutch tax purposes and the actual taxable amount based on the Dutch corporate income tax Act include the treatment of income from subsidiaries, deductibility of interest, depreciation, transactions within a tax group (fiscal unity), deduction of certain costs and hybrid payments.

4.4 Are there any tax grouping rules? Do these allow for relief in your jurisdiction for losses of overseas subsidiaries?

Companies can file a request to form a 'fiscal unity' for Dutch corporate income tax purposes if certain conditions are met. A fiscal unity may file a consolidated corporate income tax return, and the companies included in the fiscal unity are taxed on a consolidated basis as if they were just one company. As a result, transactions between companies belonging to the fiscal unity are, in principle, ignored and not subject to taxation on profits or gains. However, under the application of certain anti-abuse rules (e.g., the anti-base erosion rules), transactions between entities within a fiscal unity are taken into account. There are certain other anti-abuse rules which, for example, can be triggered by the formation or dissolution of a fiscal unity. Companies belonging to a fiscal unity are jointly and severally liable for payments of corporate income tax over the period of the fiscal unity.

4.5 Do tax losses survive a change of ownership?

There are certain anti-abuse rules based on which the deduction of tax losses can be denied if the (ultimate) shareholders of a Dutch company have been changed by at least 30% compared with the oldest loss year. Certain exceptions apply. For instance, if the activities during the loss year did not primarily consist of passive portfolio activities and it is not anticipated to reduce such activities of the taxpayer considerably in the next three years.

4.6 Is tax imposed at a different rate upon distributed, as opposed to retained, profits?
Not applicable.

4.7 Are companies subject to any significant taxes not covered elsewhere in this chapter – e.g. tax on the occupation of property?
Currently, the Netherlands does not levy a withholding tax on interest and royalty payments. However, the government has announced that a withholding tax on interest and royalty payments will apply from 1 January 2021 onwards. The applicable rate will be 21.7%. The withholding tax would apply to intra-group interest and royalty payments by Dutch resident companies to related entities residing in jurisdictions with no or low statutory tax rates (i.e. less than 9%), in jurisdictions that are on the EU blacklist of non-cooperative jurisdictions or in abusive situations.

5. Capital Gains

5.1 Is there a special set of rules for taxing capital gains and losses?
Not applicable.

5.2 Is there a participation exemption for capital gains?
The Netherlands has one of the best holding company regimes in the world. The Dutch participation exemption provides for a full exemption of income (e.g. dividends, capital gains, liquidation proceeds, etc.) derived from share interests in qualifying participations. The conditions for the application of the Dutch participation exemption are relatively easy to meet compared to similar regimes in other jurisdictions (e.g. no minimum holding period, low minimum share interest of 5% or more, etc.).

5.3 Is there any special relief for reinvestment?
A taxpayer can roll over capital gains realised in connection with the sale of a business asset under the application of the reinvestment reserve. Certain conditions apply such as the condition that the taxpayer should reinvest in an asset with the same function if the assets are not depreciated or has a depreciation term of more than 10 years, a reinvestment term of three years and the condition that the book value of the new asset should not be lower than the disposed asset.

5.4 Does your jurisdiction impose withholding tax on the proceeds of selling a direct or indirect interest in local assets/shares?
Non-Dutch tax-resident companies are subject to corporate income tax from certain Dutch sources, which may include income derived from shareholdings of at least 5% in Dutch companies, if they cannot pass either the subjective or objective test. The subjective test decides whether non-resident corporate shareholders hold shares in Dutch companies with the main purpose, or one of the main purposes, of avoiding Dutch personal income tax by another. The objective test decides whether the situation qualifies as an artificial arrangement. The rules are only applicable to income directly received from Dutch shareholdings.

6. Local Branch or Subsidiary

6.1 What taxes (e.g. capital duty) would be imposed upon the formation of a subsidiary?
Not applicable.

6.2 Is there a difference between the taxation of a local subsidiary and a local branch of a non-resident company (for example, a branch profits tax)?
Distributions by local Dutch subsidiaries are, in principle, subject to Dutch dividend withholding tax. Distributions by a local branch of a non-resident company are not subject to a branch profit tax.

6.3 How would the taxable profits of a local branch be determined in its jurisdiction?
For Dutch corporate income tax purposes, the allocation of the taxable profits of a local Dutch branch should be based on an allocation of risks and functions between the head office and the branch.

6.4 Would a branch benefit from double tax relief in its jurisdiction?
A Dutch branch is generally entitled to relief from double taxation under the application of the domestic rules but is, in most cases, not entitled to apply to Dutch double tax treaties.

6.5 Would any withholding tax or other similar tax be imposed as the result of a remittance of profits by the branch?
Distributions by a local Dutch branch of a non-resident company are not subject to a branch profit tax.

7. Overseas Profits

7.1 Does your jurisdiction tax profits earned in overseas branches?
Profits received by a Dutch company from a non-Dutch branch should be exempt for Dutch tax purposes insofar the Dutch object exemption applies.

7.2 Is tax imposed on the receipt of dividends by a local company from a non-resident company?
Reference is made to our answer to question 5.2

7.3 Does your jurisdiction have "controlled foreign company" rules and, if so, when do these apply?
Based on the implementation of the Anti-Tax Avoidance Directive 1, controlled foreign company (CFC) rules apply as from 1 January 2019. Under the CFC rules, the participation exemption does not apply to profits from passive portfolio investment activities of direct or indirect subsidiaries or permanent establishments established in jurisdictions with no or low statutory tax rates (i.e. less than 9%), or in jurisdictions that are on the EU blacklist of non-cooperative jurisdictions included in a blacklist issued by the Dutch Ministry of Finance. Only interests of 50% of Dutch taxpayers, together with related companies, are targeted. The CFC rules do not generally apply if the subsidiaries or permanent establishments have a certain level of substance (including office space and payroll expenses of generally at least EUR 100,000).

8. Taxation of Commercial Real Estate

8.1 Are non-residents taxed on the disposal of commercial real estate in your jurisdiction?

Non-Dutch tax-resident companies are subject to corporate income tax from certain Dutch sources, including Dutch real estate assets. In addition, the Netherlands levies a real estate transfer tax on the transfer of Dutch real estate assets at a rate of 2% (for residential properties) and 6% (for other properties).

8.2 Does your jurisdiction impose tax on the transfer of an indirect interest in commercial real estate in your jurisdiction?

The transfer of indirect interests in Dutch companies should not be subject to Dutch corporate income tax. However, the transfer of a company may be subject to real estate transfer tax if the assets have consisted of 50% or more of real property and, at the same time, at least 30% of the real estate are located in the Netherlands, provided that its objects are or of which the actual activities consist of acquiring, alienating or developing of real estate.

8.3 Does your jurisdiction have a special tax regime for Real Estate Investment Trusts (REITs) or their equivalent?

The Netherlands has a special tax regime for so-called Financial Investment Institutions (in Dutch: Fiscale beleggingsinstellingen), based on which qualifying entities investing directly or indirectly in Dutch real estate are subject to Dutch corporate income tax at a rate of 0%.

9. Anti-avoidance and Compliance

9.1 Does your jurisdiction have a general anti-avoidance or anti-abuse rule?

Dutch tax law includes the uncodified anti-avoidance rule called *fraus legis*. Under the application of *fraus legis*, transactions can be eliminated for Dutch tax purposes or replaced by other transactions that fall within the scope of relevant legal provisions. *Fraus legis* can be applied if the Dutch tax authorities can prove that (i) the sole or predominant motive for a transaction is tax avoidance, and (ii) the envisaged tax consequences of a transaction would conflict with the purposes and rationale of the relevant law.

9.2 Is there a requirement to make special disclosure of avoidance schemes?

Currently, a Dutch legislative proposal implementing the EU Directive, regarding Mandatory Disclosure 2 (commonly known as the DAC6), is being discussed in the Dutch parliament. Based on the legislative proposal, service providers, or in absence thereof, tax payers, should disclose certain reportable tax arrangements. The proposed legislation should be implemented no later than 31 December 2019 and will apply retroactively from 25 June 2018 onwards.

9.3 Does your jurisdiction have rules which target not only taxpayers engaging in tax avoidance but also anyone who promotes, enables or facilitates the tax avoidance?

The Netherlands has no rules targeting promoters, enablers or facilitators of tax avoidance, besides the proposed DAC6 rules described in question 9.2 above. However, there are rules based on which persons cooperating with tax evasion can be fined.

9.4 Does your jurisdiction encourage "co-operative compliance" and, if so, does this provide procedural benefits only or result in a reduction of tax?

Yes. The Netherlands has a mechanism based on which taxpayers and the tax authorities can cooperate together on the basis of mutual trust (so-called horizontal monitoring). The mechanism only provides procedural benefits for the taxpayer.

10. BEPS and Tax Competition

10.1 Has your jurisdiction introduced any legislation in response to the OECD's project targeting BEPS?

In response to the OECD's project targeting BEPS, the Netherlands has implemented the Anti-Tax Avoidance Directive 1, based on which the earning stripping rules and controlled foreign company (CFC) legislation were introduced and the rules regarding exit taxation were amended.
Furthermore, the MLI was ratified (reference is made to our answer to question 10.2). Besides these measures, the Ministry of Finance envisages to implement the Anti-Tax Avoidance Directive 2, introduce a conditional withholding tax on interest and royalty payments, and amend the conditions of the Dutch corporate income tax rules for non-resident corporate shareholders in Dutch companies and the conditions of the Dutch dividend withholding tax exemption.

10.2 Has your jurisdiction signed the tax treaty MLI and deposited its instrument of ratification with the OECD?

The Netherlands has signed the tax treaty MLI, ratified it and deposited its instrument of ratification. The MLI will enter into force on 1 January 2020 in the Netherlands.

10.3 Does your jurisdiction intend to adopt any legislation to tackle BEPS which goes beyond the OECD's recommendations?

As mentioned in our answer to question 10.1, the Netherlands aims to introduce a conditional withholding tax on interest and royalty payments.

10.4 Does your jurisdiction support information obtained under Country-by-Country Reporting (CBCR) being made available to the public?

Based on Dutch law, information obtained under Country-by-Country Reporting (CBCR) is not made available to the public. However, the Dutch government supports this concept and is in discussions with the other EU Member States on the matter.

10.5 Does your jurisdiction maintain any preferential tax regimes such as a patent box?

In their annual corporate income tax returns, Dutch taxpayers can apply an 'innovation box regime' to qualifying profits derived from benefits from certain self-developed intangible fixed assets. Under the innovation box regime, profits are included only in the tax base of a taxpayer for 7/25 part, resulting in an effective tax rate of 7%. It is envisaged that the effective tax rate under the innovation box regime will increase to 9% on 1 January 2020.

11 Taxing the Digital Economy

11.1 Has your jurisdiction taken any unilateral action to tax digital activities or to expand the tax base to capture digital presence?

No. The Dutch government is currently investigating the possibilities to amend the taxation of digital activities. The outcome of this investigation will be published in the beginning of the year 2020.

11.2 Does your jurisdiction favour any of the G20/OECD's "Pillar One" options (user participation, marketing intangibles or significant economic presence)?

The Dutch government supports the international discussions of the G20/OECD to develop a consensus on the taxation of the digital economy. The Dutch government is however not yet convinced which approach should be preferred and awaits a more detailed impact analysis of the proposals.

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